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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHELLEY ARLENE PULEX,

Defendant and Appellant.

G039994

(Super. Ct. No. 07CF0031)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

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THE COURT:^{*}

Defendant was convicted by a jury of conspiracy to commit an assault with a deadly weapon (a baseball bat); possession of a deadly weapon (a baseball bat); and unlawfully tampering with a vehicle. She was sentenced to three years supervised probation, with one of the terms of probation ordering her to pay restitution in an amount to be determined by the probation department.

On appeal defendant challenges the trial court's restitution order. She contends the trial court abused its discretion when it made her liable for the full amount of victim restitution, and for failing to make the restitution order for the victim's medical expenses joint and several with the co-defendant. We affirm the judgment.

I

Facts and Proceedings

In April 2007, the People filed an information charging defendant along with co-defendant Paul Angelo Gonzales with one count of conspiracy to commit assault with a deadly weapon, a baseball bat, in violation of Penal Code section 182, subdivision (a), subsection (1); unlawfully assaulting Jose Rucovo ("the victim") with a deadly weapon, a vehicle, in violation of Penal Code section. 245, subdivision (a); involvement in a hit and run pursuant to Vehicle Code section 2001, subdivision (a); possessing a deadly weapon, a baseball bat, pursuant to Penal Code section 1020, subdivision (a)(1), and unlawfully tampering with a vehicle, a misdemeanor, pursuant to Vehicle Code section 10852, on December 31, 2006. ¹

* Before Sills, P.J., Moore, J., and Fybel, J.

¹ In January 2008, the court dismissed count 3 on the People's motion. The court granted defendant's motion to dismiss count 2 pursuant to Penal Code section 1118.1.

In February 2008, the trial court sentenced defendant to three years supervised probation, with one of the terms of probation requiring her to pay restitution in an amount to be fully determined by the probation department.²

Facts

Jose Rucovo (the victim) was living in Santa Ana, and working at two restaurants in Costa Mesa, California. He met the defendant through his brother-in-law, Daniel Ramos, who was a school friend of hers. The victim also knew defendant's mother because the mother babysat for the victim's son.

Prior to the incident, defendant had asked the victim for money on two occasions. In the summer of 2006, the victim loaned her \$2,200 for her classes in nursing. And, although she never paid the previous amount back, later that summer she asked the victim for another \$15,000 stating she was having trouble with her parents. The victim loaned her \$2,700.

Defendant signed an agreement promising to pay back the \$2,700 by January 2007. The victim also called her about four or five times to remind her that she had to pay the money back. In December of 2006, she told the victim she had some of the money to pay him back but a friend had taken it. On December 30, 2006, the victim told defendant's mother that he was waiting for defendant to pay him back. The victim denied ever having threatened defendant; showing her a gun; or telling her he was a member of the Mexican Mafia.

² In January 2008, co-defendant Gonzales, who had no prior criminal record, pled guilty to all counts alleged in the complaint, including felony counts. As part of his plea agreement, the conspiracy count was reduced by the trial court, to a misdemeanor, and an enhancement alleging he inflicted great bodily injury was stricken. He received a total term of three years in state prison. Sentencing was continued by the court until February 2008, to allow Gonzales to finish the college courses he was taking before starting prison.

The Assault on December 31, 2006

Co-defendant Paul Gonzales told 18-year-old Cesar Cazares, a few days before the assault took place that someone was harassing defendant, and that he (Gonzales) wanted to do something about it. On December 30, 2006, defendant, Gonzales, Cazares, and a 15-year-old named Luis Hernandez gathered at Cazares's house. With defendant directing them to where the victim lived in Santa Ana, Gonzales drove them all in a van containing baseball bats. The plan was to have the three young men hit the victim with the baseball bats when he emerged from his house.

When they arrived at the victim's house about 1:00 a.m., they parked the van a few car lengths behind the victim's car. Gonzales removed the lug nuts off the wheels of the victim's truck with a lug wrench. They all fell asleep in the van waiting for the victim to leave his house.

At about 6:00 a.m., the victim emerged from his house. He got into his truck, and was turning his vehicle to get out of his parking spot when the left front tire fell off. The lug nuts of his tires had been removed, and a right tire had also been slashed. The victim went inside his house to ask his roommate to assist him with the tire. When the victim came out again from his house, he had a jacket on that he was previously not wearing. Defendant told Gonzales that the victim always carried a gun in his jacket.

The victim and his roommate were able to jack up the truck and put the tire back on. Gonzales started driving down the street in front of the victim's house where the victim was standing. The plan was for Gonzales to stop the van next to the victim; the three assailants would get out of the van with their weapons and start hitting the victim. Unexpectedly, however, after Gonzales slowed down, he suddenly sped up and swerved directly into the victim. The victim was hit and thrown down the street. The van then crashed into a car smashing the right front side of the van.

The victim was left screaming in pain while lying in the street blocking lanes of traffic. He suffered a broken left arm, and fractured ribs. He was hospitalized for three days.

About an hour to an hour and half after the incident, defendant was interviewed by the Santa Ana Police Department. A tape of this interview was played for the jury, and was introduced into evidence along with a transcript of the interview. In the interview, defendant told the police the victim said he was going to kill her because she had not paid him; she said he showed her a gun; and she also said he told her he was in the Mexican Mafia.³ She also admitted she gave the other assailants the money to buy a tool enabling them to take the bolts off the wheels of the victim's vehicle.

II

Discussion

The Court's Order Requiring Appellant to Pay Victim Restitution was Proper

Defendant contends the trial court abused its discretion when it made her liable for the full amount of the victim restitution, and for failing to make the restitution order for the victim's medical expenses joint and several with co-defendant Gonzales. We disagree.

At the February 29, 2008, sentencing hearing, the court granted defendant three years probation. When imposing sentence the court noted it could not, "imagine how you [defendant] could think that there wasn't going to be some serious injury based on what you put in motion here, what you started here. . ." The court further stated, "I am telling you as a sentencing judge who has seen a lot of cases, this case was evil, what you

³ The court found defendant's version of the facts to be not credible. At the sentencing hearing, the court stated that "this is a pretty gentle man, this was - - all these things about him being in the Mexican Mafia and threatening you and all that is a bunch of baloney, okay. This man was actually trying to do you a favor, and for you to turn around and screw up his life physically is unbelievable."

did to this man, what you set in motion, this was [callous], this was brutal, and this is going to affect this human being for the rest of his life.”

A major factor in its decision to impose probation was the court’s concern that defendant be out working in order to financially compensate the victim, and to ensure that he was paid back in full. As the court so stated, “I would rather have you make restitution to this human being that you almost caused to be killed.”

Taking into account the “extensive” amount of damages which totaled \$82,000, along with the prosecution’s further advisement that the full amount totaled over \$94,000, the court told defendant, “You are [also] to make restitution to this man, so you are going to pay him back slowly little by little, to compensate him for his losses. That is payable through probation.”

Because of the amount involved, the court ordered any restitution to be “ongoing” in nature, and further advised that it was going to “retain jurisdiction.” The court also stated it was not going to set the amount of restitution at the time of the hearing, because the matter needed to be deferred to probation as, “there might be other bills that come in and things of that nature.”

No objections were made by either counsel regarding the amount and manner in which restitution was to be handled as set forth by the court.

Defendant has Waived this Issue on Appeal

Defendant did not raise the issue of joint and several liability at the sentencing hearing. Neither counsel objected to the trial court deferring the amount of restitution to probation, and the fact that the restitution amount was not fully set at the original sentencing hearing.⁴

Generally, “. . . only ‘claims properly raised and preserved by the parties are reviewable on appeal.’ [Citation.] [Our Supreme Court has] adopted this waiver rule

⁴ Defendant’s claim is also premature.

‘to reduce the number of errors committed in the first instance’ [citation], and ‘the number of costly appeals brought on that basis’ [citation.] . . . Thus, all ‘claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’ raised for the first time on appeal are not subject to review. [Citations.]” (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Thus, because the claim is made for the first time on appeal, it has been waived.

The Court did not Abuse its Discretion in Ordering Defendant to Pay Restitution

Even if defendant had not so waived her claim, it still nevertheless fails. The trial court’s decision regarding the appropriate amount of victim restitution may be reversed only upon a showing of a clear abuse of discretion. Moreover, the trial court can use any rational method of calculation which is reasonably designed to make the victim whole. (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.)

We thus conclude there was no abuse of discretion here. The defendant was the instigator of the scheme to harm the victim, and was intricately connected with the set of circumstances that resulted in his injuries. As the court so stated to defendant, “I can’t imagine how you could think there wasn’t going to be some serious injury based on what you put in motion here, what you started here.”

We further conclude the court did not abuse its discretion when it required defendant pay restitution even if the co-defendant does not. Defendant undertook the risk of liability for the victim’s loss here by her acts in arranging for him to be harmed. Her obligation is clear. She must undertake the full amount of restitution and may pay less if the co-defendant also meets his obligation. (*People v. Campbell* (1994) 21 Cal.App.4th 825, 833.)

The Court is not required to Order Restitution Jointly and Severally

The court in *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1535, held a trial court has “the authority to order direct victim restitution paid by both defendants

jointly and severally.” This holding is in accordance with *People v. Madrana* (1997) 55 Cal.App.4th 1044, 1049-1052; *People v. Arnold* (1994) 27 Cal.App.4th 1096, 1098, 1100; and *People v. Zito* (1992) 8 Cal.App.4th 736, 743-746.)

However, while a court *may* order joint and several liability we have found no cases which require a court *must* do so. The decision how to order reimbursement is placed squarely within the province of the trial court.

III

Disposition

The judgment is affirmed.